

STANDARD CRIMINAL 16

EVIDENCE OF ANY KIND

The State must prove guilt beyond a reasonable doubt based on the evidence. The defendant is not required to produce evidence of any kind. The decision on whether to produce any evidence is left to the defendant acting with the advice of an attorney. The defendant's decision not to produce any evidence is not evidence of guilt.

SOURCE: RAJI (Criminal) No. 16 (1996); A.R.S. § 13-115 (statutory language as of October 1, 1978).

USE NOTE: If a defendant testifies and refers to absent witnesses or defense counsel argues about others involved or infers that the State could have called other witnesses, the State may argue to the jury that although the State has the burden of proof, the defense has the power of subpoena also. This comment is not a comment on defendant's right not to testify. *See State v. Petzolt*, 172 Ariz. 272, 278, 836 P.2d 982, 988 (App.1991); *State v. Rutledge*, 205 Ariz. 7, 14, 66 P.3d 50, 57 (2003) (stating that the comments must be taken in the context of the facts presented and in that case, where defense raised an alibi defense, it was proper for prosecutor to comment that the defendant's interview with the police did not include any alibi evidence). It is well settled law that a prosecutor may comment on defendant's failure to produce exculpatory evidence as long as the State does not call attention to defendant's failure to testify. *State v. Herrera*, 203 Ariz. 131, 137, 51 P.3d 353, 359 (App.2002). However, the State is not permitted to argue to the jury about the defense failure to produce witnesses or evidence when there has been no evidence presented or arguments made by counsel about absent witnesses or evidence or the failure of the State to call witnesses or present specific evidence. *See State v. Corona*, 188 Ariz. 85, 89, 932 P.2d 1356, 1360 (App.1997).
